PROF DATO' DR RAHMAT MOHAMAD
v. SHAHIZAD SULAIMAN

HIGH COURT MALAYA, KUALA LUMPUR
LEONG WAI HONG JC
[WRIT SUMMON NO: WA-23NCVC-28-04-2023]
26 JANUARY 2023

Abstract – *Although an application for discontinuance of a suit has been filed within the timeline prescribed under O. 21 r. 2 of the Rules of Court 2012, such application can still be imposed with a term 'without liberty to file afresh' as long as it can be shown that the application was an abuse of process and the applicant has received a substantial advantage prejudicial to the other party of the suit prior to the filing of the application.*

CIVIL PROCEDURE: *Action – Discontinuance of – Discontinuance without leave of court – Applicant applied notice of discontinuance to discontinue defamation suit one day prior to due date of filing defence – Applicant sought for discontinuance of defamation suit with liberty to file afresh – Whether court seized with power to impose term 'without liberty to file afresh' on discontinuance as applicant came within O. 21 r. 2 of Rules of Court 2012 – Whether applicant had obtained substantial advantage prior to filing of discontinuance application*

The plaintiff was the former Chairman of Human Rights Commission of Malaysia ('SUHAKAM'), while the defendant was the former Deputy Secretary of SUHAKAM, before he requested to be reverted to Principal Assistant Secretary. The defamation suit herein concerned the complaints lodged by the defendant to various bodies/departments of SUHAKAM, especially to the Complaints and Monitoring Working Group ('CMWG'), against the plaintiff in respect of the latter's action during his tenure as the Chairman of SUHAKAM ('complaints'). The complaints, among others, were related to alleged acts of interference with appointment procedures, conflict of interest and abuse of power by the plaintiff. Nevertheless, on the same date the defamation suit was filed, the plaintiff's solicitors had written to the CMWG requesting SUHAKAM to immediately stop its inquiries regarding the complaints pursuant to s. 12 of the Human Rights Commission of Malaysia Act 1999 ('Act'). As a result of the filing of the defamation suit, SUHAKAM, *via* s. 12(3) of the Act, informed the defendant that it could no longer continue its investigations into the complaints. Nevertheless, during the case management fixed for the defamation suit, the Registrar directed the defence to be filed on 21 June 2023. However, a day prior to the said date, the plaintiff informed the defendant that he intended to withdraw the defamation suit. This was then followed up by the filing of a notice of discontinuance to discontinue the defamation suit with liberty to file afresh

on the same day. According to the plaintiff, the discontinuance should be allowed because it had been applied within the timeline prescribed under O. 21 r. 2(1) of the Rules of Court 2012 ('ROC'). The issue that arose was whether the court could impose the term 'without liberty to file afresh' considering the plaintiff came within O. 21 r. 2 of the ROC thus, allowing the plaintiff to discontinue the defamation suit without leave of court.

Held (allowing discontinuance of defamation suit without liberty to file afresh):

(1) The withdrawal of the defamation suit was an abuse of process as the plaintiff arising from the filing of the suit had already obtained a substantial advantage to the prejudice of the defendant. This was because, the plaintiff, after the filing of the defamation suit, had written to SUHAKAM stating that that the same was prohibited by s. 12(3) of the Act to investigate the complaints once the plaintiff had filed a suit against the defendant for lodging the said complaints. It was upon this premise SUHAKAM agreed to stop their enquiry into the conduct of the plaintiff. Further, the plaintiff in his supporting affidavit had not stated any reason for seeking a discontinuance of the defamation suit. He also did not proffer any reason as to why he sought a withdrawal with liberty to file afresh. As the silence did not dispel the suspicion that the filing of the withdrawal was an abuse of process, the court therefore could and should impose the term 'without liberty to file afresh on the same matter as set out in the present suit' on the discontinuance sought by the plaintiff. (paras 26-28 & 30)

Case(s) referred to:

Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors [1991] 3 CLJ 1783; [1991] 2 CLJ (Rep) 684 HC ***(refd)***

Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA ***(refd)***

Mega Crystal Network Sdn Bhd v. Yayasan Selangor & Ors [2020] MLJU 133 HC ***(refd)***

Mohd Sumali Reduan & Anor v. Shabudin Yahaya [2020] CLJU 1653; [2020] 1 LNS 1653 HC ***(refd)***

Supramaniam Govindasamy v. Ravi Govindasamy [2023] MLJU 1844 ***(refd)***

Legislation referred to:

Human Rights Commission of Malaysia Act 1999, s. 12(3)
Rules of Court 2012, O. 21 rr. 2(1), 3

Other source(s) referred to:

The Malaysian Civil Procedure 2021, Sweet & Maxwell, vol 1, para 21/2/2

For the plaintiff - Syed Afiq Syed Albakri; M/s Zharif Nizamuddin
For the defendant - Gokul Radhakrishnan; M/s Sreenevasan
Watching brief for SUHAKAM - Andrew Khoo

Reported by Syamim Ariffin

JUDGMENT
(Encl. 9)

Leong Wai Hong JC:

Introduction

[1] The application before me raises an interesting point of procedure. The point being whether the plaintiff one Prof Dato' Dr Rahmat bin Mohamad, who is the former Chairman of Suruhanjaya Hak Asasi Manusia (Human Rights Commission of Malaysia) ("SUHAKAM"), is entitled – as of right – to discontinue a writ of summon that he has filed against a senior staff of SUHAKAM with liberty to file afresh on the ground that he has filed his notice of discontinuance within the timeline prescribed under O. 21 r. 2(1) of the Rules of Court 2012. ("ROC")

[2] The plaintiff contends that I, namely, the court has no power and jurisdiction to impose terms on his withdrawal once he comes within O. 21 r. 2(1) of the ROC. He says that I can only impose terms if his withdrawal is pursuant to O. 21 r. 3 of the ROC.

[3] In short, the plaintiff contends I cannot order a discontinuance without liberty to file afresh and that the only order I can make is to allow the plaintiff's application to withdraw the writ with liberty to file afresh.

[4] Counsel has informed me there are no reported cases directly on point. I thank counsel as well as Mr Andrew Khoo holding a watching brief for SUHAKAM for their submissions which have greatly assisted me in arriving at my decision. I heard counsel on 19 January 2024. I reserved decision to 26 January 2024. I now deliver my decision with full grounds.

Background Facts

[5] The plaintiff is a former Chairman of SUHAKAM. The plaintiff held this position from June 2022 to 31 August 2023.

[6] The defendant commenced employment at SUHAKAM in 2006 as an Assistant Secretary and since 2014 has been a Ketua Penolong Setiausaha (Principal Assistant Secretary) ("KPSU").

[7] In November 2022, the defendant was promoted to the position of Timbalan Setiausaha (Deputy Secretary) ("TSU") with a six-month probationary period. This is a senior management position. In April 2023, the defendant requested that his position be reverted to KPSU.

[8] The suit here concerns complaints made by the defendant in respect of the actions of the plaintiff during his time as Chairman of SUHAKAM.

[9] The complaints relate to alleged acts of interference with appointment procedures, conflict of interest, abuse of power, aggression and bullying towards senior management and officers of SUHAKAM and racism.

[10] These complaints were submitted to various bodies/departments including the Bahagian Aduan dan Pemantauan (Complaints and Monitoring Working Group) of SUHAKAM.

[11] On 26 April 2023, the plaintiff filed the present suit against the defendant for defamation arising from the complaints, in particular the complaint to the Complaints and Monitoring Working Group of SUHAKAM.

[12] On the same day, the plaintiff's solicitors wrote to the complaints and monitoring working group of SUHAKAM requesting SUHAKAM to immediately stop its inquiry into the complaint to SUHAKAM as required under s. 12 of the Human Rights Commission of Malaysia Act 1999.

(See letter from the plaintiff's solicitors to SUHAKAM dated 26 April 2023 at pp. 34 to 35 of the defendant's affidavit in reply/encl. 11).

[13] As a result of the filing of the suit by the plaintiff, SUHAKAM citing s. 12(3) of the Human Rights Commission of Malaysia Act 1999 informed the defendant that SUHAKAM can no longer continue their investigations into the defendant's complaint against the plaintiff.

(See letter from SUHAKAM to the defendant dated 23 May 2023 at pp. 26 to 27 of the defendant's affidavit in reply).

Discontinuance Of Suit

[14] At the first case management fixed for this matter on 29 May 2023, the Registrar directed that the defence was to be filed on 21 June 2023.

[15] On 20 June 2023, one day before the defence was due, the defendant's solicitors were notified by telephone and by letter that the plaintiff intends to withdraw the present suit. This was then followed up by the filing of the notice of discontinuance (encl. 7) on the same day.

[16] The defendant objected to the notice of discontinuance with liberty to file afresh. Hence, the plaintiff filed encl. 9 seeking to discontinue the present action against the defendant with liberty to file afresh and with costs to be borne by the defendant.

The Law On The Discontinuance Of A Suit By A Plaintiff

[17] The law on the discontinuance of a suit by a plaintiff is found in O. 21 of the ROC. Order 21 r. 2(1) of the ROC allows the discontinuance of an action by a plaintiff without the leave of court if the notice of discontinuance is filed not later than 14 days after the service of the defence on the plaintiff. Except as provided under O. 21 r. 2, a plaintiff needs the leave of court to discontinue his suit and the court can impose terms like no liberty file afresh when a defendant is *dominus litis*.

[18] Order 21 r. 2 of the ROC reads as follows:

> Discontinuance of action without leave (O. 21 r. 2)
>
> (1) **The plaintiff in an action begun by writ may, without the leave of the Court, discontinue the action** or withdraw any particular claim made by him therein, as against any or all of the defendants **at any time not later than fourteen days after the service of the defence on him** or, if there are two or more defendants, of the defence last served, by serving a notice in Form 32 to that effect on the defendant concerned. (emphasis added)

Issue Before Me

[19] The issue before me is whether the court can still impose the term "without liberty to file afresh" on a plaintiff like the plaintiff here who comes within O. 21 r. 2 of the ROC and therefore, can discontinue without leave of court.

The Law On Abuse Of Court Process In Relation To O. 21 r. 2 Of The ROC

[20] The starting principle is that a plaintiff who comes within O. 21 r. 2 of the ROC is entitled, *prima facie*, to discontinue without leave of court. The court will normally allow the plaintiff to discontinue if he wants to, provided no injustice will be caused to the defendant. This is because it is not desirable that a plaintiff should be compelled to litigate against his will. (See *Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors* [1991] 3 CLJ 1783; [1991] 2 CLJ (Rep) 684; [1992] 1 MLJ 51 Lim Beng Choon J).

[21] As to when a court will compel a plaintiff to litigate against his will, this has been explained in *Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors* [1991] 3 CLJ 1783; [1991] 2 CLJ (Rep) 684; [1992] 1 MLJ 51 by Lim Beng Choon J and reproduced in *Supramaniam Govindasamy v. Ravi Govindasamy & Anor* [2023] CLJU 1640; [2023] 1 LNS 1640; [2023] MLJU 1844 HC by Azizan Md Arshad JC at para. 17 as follows:

> [17] In *Hanyo Sdn Bhd v. Marplan Sdn Bhd & Ors* [1992] 1 MLJ 51, the court, after analysing and considering the principles expressed by three cases related to the withdrawal or termination of the action, namely the cases of (i) *Costanho v. Brown & Root (UK) Ltd & Anor* [1981] AC 557, (ii) *Covell Mathews & Partners v. French Wools Ltd* [1977] 2 All ER 591, and (iii) *Oversea Union Finance Ltd v. Lim Joo Chong* [1971] 2 MLJ 124, held as follows:
>
> > The principles that can be extracted from the aforementioned cases are that the court would not compel a Plaintiff to continue his action against a Defendant if he does not want to do so provided no injustice is cause to the Defendant. Injustice would be caused to the Defendant if:

A (1) the discontinuance was made with ulterior motive to obtain a collateral advantage as in the case of *Costanho v. Brown & Root Ltd*;

(2) the discontinuance was not made *bona fide* by the Plaintiff but it was made in order to obtain an advantage to which he has no right to retain since he has ceased to be *dominis litis* as the B defendant has perfectly good defence – see *Oversea Union Finance Ltd v. Lim Foo Chong*;

(3) by the discontinuance of the action the defendant would be deprived of an advantage which he has already gained in the litigation – see *Covell Matthews & Partners v. French Wools Ltd*.

C (see also *Crestronics (M) Sdn Bhd lwn. Panasonic Manufacturing Malaysia Bhd* [2021] MLJU 2845)

[22] In my view, if a court does not wish to compel a litigant to litigate against his will, the court can still impose the term "without liberty to file D afresh on the same matter set out in the present suit" on a plaintiff who comes within O. 21 r. 2 of the ROC who can discontinue without leave of court, if the court finds that the discontinuance is an abuse of the process of the court. There will be an abuse of the process of the court if the true purpose for filing the suit is something other than to obtain a remedy provided by law, E and the discontinuance of the suit comes after the plaintiff arising from the filing of the said suit has achieved an advantage to the prejudice of the defendant.

[23] Support for this view can be gathered from *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533; [1999] 4 MLJ 637 at 645 F CA Gopal Sri Ram JCA, *Mohd Sumali Reduan & Anor v. Shabudin Yahaya* [2020] CLJU 1653; [2020] 1 LNS 1653; [2020] MLJU 1908 HC, Wong Hok Chong JC and *The Malaysian Civil Procedure 2021* Vol. 1 para. 21/2/2 Sweet & Maxwell.

[24] This is what the Court of Appeal said in *Jasa Keramat Sdn Bhd & Anor* G *v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533 at pp. 540 to 541; [1999] 4 MLJ 637 at p. 645 CA *via* Gopal Sri Ram JCA:

Abuse of process

It is trite that a person who has a legitimate grievance may invoke the court's process H *to obtain redress. But cases may arise where the true purpose for invoking the court's process is something other than to obtain a remedy provided by law. It may be to oppress a defendant.* Or it may be to apply pressure upon him which the law regards as illegitimate. Or it may be to merely commence an action and let it hang over the head of the defendant with no intention of bringing it to a conclusion (see *Grovit & Ors v. Doctor & Ors [1997] 2 All ER 417). Or the plaintiff having commenced an action may take steps to discontinue it after* I *the defendant has become dominis litis, thereby preventing the defendant from obtaining vindication through a judgment of the court.* In the last instance, the

court will refuse to permit discontinuance, or if a notice of discontinuance has been filed, will set it aside and direct the action to proceed (see *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 2 MLJ 124; *Castanho v. Brown & Root (UK) Ltd & Anor* [1981] AC 557).

A fairly recent decision on the point is that of the English Court of Appeal in *Gilham v. Browning & Anor* [1998] 2 All ER 68. It was a case where the defendant's discontinuance of his counterclaim before the county court was held to be an abuse of process. It was there held that whether in a particular case there was an abuse would be a question of fact and degree.

Since the circumstances in which the court's process may be abused are varied and numerous, the categories of such cases are therefore not closed. (emphasis added)

[25] Another relevant authority is *Mohd Sumali Reduan & Anor v. Shabudin Yahaya* [2020] CLJU 1653; [2020] 1 LNS 1653; [2020] MLJU 1908 HC, where Wong Hok Chong JC said:

No Leave Required

[14] As the Defence has not been filed, the Plaintiff is entitled to withdraw the Writ without leave – that is as of right – without the Court imposing any conditions. It is implicit that the Plaintiff has liberty to file afresh because the matter has not been decided on the merits and is thus not *res judicata*. In fact, they could have done so by just serving a notice on the Defendant, without the instant application.

[15] It is only where leave is required to withdraw the Writ that the Defendant may move the court to impose conditions – such as it be withdrawn with no liberty to file afresh. This is not the case here.

Proviso – No Abuse of Process

[16] The only proviso is that the withdrawal must not be tantamount to an abuse of process, where the Plaintiffs have already obtained a substantial advantage in the action to the prejudice of the Defendant. There is no evidence of that here.

(emphasis added)

Application Of Law To The Facts

[26] I have perused the facts. It shows that the withdrawal of the defamation suit is an abuse of process as the plaintiff arising from the filing of the suit has already obtained a substantial advantage to the prejudice of the defendant.

[27] This is because after the filing of the defamation suit on 26 April 2023 the plaintiff's solicitors, on the same day, have written to SUHAKAM stating that SUHAKAM is prohibited by s. 12(3) of the Human Rights Commission of Malaysia Act 1999 from investigating the complaints made by the defendant against the plaintiff once the plaintiff has filed a suit against the defendant for lodging the said complaints. It was upon this premise that SUHAKAM on 23 May 2023 agreed to stop their enquiry into the conduct of the plaintiff.

(See letter from the plaintiff's solicitors to SUHAKAM dated 26 April 2023 at pp. 34 to 35 of the defendant's affidavit in reply and letter from SUHAKAM to the defendant dated 23 May 2023 at pp. 26 to 27 of the defendant's affidavit in reply).

[28] The plaintiff in his supporting affidavit has not stated any reason for seeking a discontinuance of his defamation suit now. He has further not given any reason why he sought a withdrawal with liberty to file afresh. His silence does not dispel the suspicion that the filing of the suit is an abuse of process for the reasons I have stated above.

[29] I also note that in *Mega Crystal Network Sdn Bhd v. Yayasan Selangor & Ors* [2020] MLJU 133 HC, Julie Lack JC refused to grant liberty to file afresh as the plaintiff there failed to provide good reasons for the discontinuance.

[30] It is therefore right that the court can and should impose the term "without liberty to file afresh on the same matter set out in the present suit" on the discontinuance by the plaintiff here. As stated by the Court of Appeal in *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533; [1999] 4 MLJ 637 at 645 CA *via* Gopal Sri Ram JCA the court must be vigilant to ensure that its process is not abused by a litigant.

[31] To allow a discontinuance with liberty to file afresh, when there has been an abuse of the process, would make a mockery of the law such that right-thinking members of the public will think "The law is an ass – an idiot", to quote Charles Dickens' memorable phrase in his novel *Oliver Twist*.

Decision

[32] I allow the discontinuance with no liberty to file afresh on the same matter set out in the present suit. The plaintiff is to pay costs of RM5,000 to the defendant subject to allocatur.